Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-467

~~FRED F. FRENCH INVESTING COMPANY, INC.~~, RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JAMES F. CAHILL
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GOLDSTEIN SHAMES HYDE WIRTH BEZAHLER & CAHILL
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Date: September 30, 1976

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Appendices:

The following documents are incorporated by reference to the jurisdictional statement of appellant Fred F. French Investing Company, Inc.:

A—Opinion of the Court of Appeals of the State of New York

B—Opinion of the Supreme Court, New York County

C—Order of the Court of Appeals entered May 4, 1976

D—Notice of Appeal of Appellant Fred F. French Investing Company, Inc.

E—Order of Court of Appeals dated September 8, 1976, denying motion for reargument

F—Zoning Resolution of the City of New York

G—Resolution of December 7, 1972 amending Zoning Map of the City of New York

H—Judgment dated April 25, 1974 of the Supreme Court, New York County

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In addition, the following document is included in the appendix filed herewith:

I—Notice of Appeal of Appellants Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company, and Harry B. Helmsley, filed July 23, 1976 with the New York County Supreme Court 8

TABLE OF AUTHORITIES

Cases Cited

Gillespie v. *U.S. Steel Corp.*, 379 U.S. 148 (1964) 7

Keystone Associates v. *State of New York*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), *aff'd*, 33 N.Y.2d 848, 352 N.Y.S.2d 194, 307 N.E.2d 254 (1973) 6

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Fifth Amendment 4

Fourteenth Amendment 4

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FRED F. FRENCH INVESTING COMPANY, INC., RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

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THE CITY OF NEW YORK,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Preliminary Statement

Appellants Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company, and Harry B. Helmsley (the "Owners"), appeal from the final order of the Court of Appeals of the State of New York, entered on May 4, 1976, affirming the order of the Appellate Division, First Department dated February 4, 1975, which affirmed the judgment of the Supreme Court of the State of New York entered April 25, 1974, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

The Owners' cross-claim in this action challenged an amendment to the New York City Zoning Ordinance and Zoning Map which created "Special Park Districts" out of two parcels of property owned by them. The Owners were thereby prohibited from using these parcels for any purpose other than that which would be incidental to "passive recreational uses". The Owners in effect were deprived of the right to earn profits from the use of their property and were constrained to permit and support the use of their property for the benefit of the general public. The Court of Appeals of the State of New York has sustained this claim of the Owners by holding that this rezoning constituted an unconstitutional taking of their property, but that the Owners and Fred F. French Investing Co. Inc. ("French"), the mortgagee, were not entitled to monetary damages as for a taking in eminent domain because there had been no physical occupation of the Owners' property by the City. (Appendix A).

The attorneys for French are serving and filing concurrently herewith a jurisdictional statement in support of their appeal in this action, with which we are in agreement. We adopt and incorporate herein by reference the entire jurisdictional statement of French, as well as the documents contained in French's appendices, in support of the jurisdiction of the Court over this appeal as well as over French's appeal.

In addition to the questions raised by French's jurisdictional statement, which are incorporated by reference herein, one additional substantial question is raised by this appeal, which is discussed below.

Additional Question Presented

Did the enactment of the unconstitutional zoning amendment entitle the Owners to damages as for a temporary taking during the period the amendment was in effect?

It should be noted that this question arises only if the Court, after passing on the question raised by French's jurisdictional statement, should conclude, as did the courts below, that the zoning amendment, although invalid because it is confiscatory, did not give rise to a permanent taking of the Owners' property because there was no physical governmental occupation of that property.

The Court of Appeals did not rule on the question stating as follows:

> "With respect to damages caused by the unlawful zoning amendment the issue is not properly before the court. The owner never made such an unequivocal claim and still does not. Instead, it claims compensation for value appropriated as for an 'inverse' taking in eminent domain. The mortgagee and personal guarantor make parallel claims. That view of the invalid amendment is not adopted for the reasons discussed at length earlier. The City, on the other hand, seeks a declaration with respect to such damages but in the absence of allegation or proof that such damages lie, are claimed, or how they have been incurred, there can be no abstract declaration and therefore there is none." 39 N.Y.2d at 599, 385 N.Y.S.2d at 12.

It is submitted that the record will show that the Court of Appeals was incorrect; that this question was raised at every stage of the proceedings below, by the motion for summary judgment in the New York County Supreme Court, the motion for reargument to that court, and by the appeals to the Appellate Division and the Court of Appeals. In support of the motion for reargument to the New York County Supreme Court, the Owners demonstrated in detail the damages they had sustained as a result of the enactment of the zoning amendment, including (1) just compensation for the temporary appropriation of their property, (2) loss of the opportunity to con-

struct buildings on the parks due to rising construction and financing costs, (3) interest owned on French's mortgages, (4) real property taxes owed to New York City, and (5) loss of investment in acquiring and carrying these properties.

Moreover, as noted by the Court of Appeals, the City had sought a declaration that the Owners and French were not entitled to any damages, and in oral argument before the Court of Appeals, the City conceded that the Owners' pleadings were broad enough to encompass a claim for the temporary taking of the parks.

The Court of Appeals was therefore incorrect. The issue of a temporary appropriation had been presented to it and to the other courts below, and the question should have been decided.

Constitutional and Statutory Provisions Involved

Fifth and Fourteenth Amendments to the Constitution. New York City Zoning Resolution § 91-00 et al.

The Question Is Substantial

The Owners contend that if the Court of Appeals was correct in holding the zoning amendment to be invalid when enacted, the Owners' property was at least "taken" by New York City during the period of time between the enactment of the zoning amendment on December 7, 1972 and the entry of the order of the Court of Appeals on May 4, 1976, affirming the lower court orders voiding the amendment.* Such a temporary appropriation of the

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* Under CPLR § 5519(a)(2) and (e), enforcement of the judgment of the Supreme Court of the State of New York, County of New York, entered April 25, 1974, has at least been stayed pending the appeals of the City of New York to the Appellate Division and the Court of Appeals.

Owners' property without compensation by itself represented a taking of the Owners' property without just compensation and without due process of law, thereby violating the Fifth and Fourteenth Amendments.

This Court has ruled on the question of temporary takings of property previously in *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), where it was held that the taking of part of a lease by the Government permitted consideration of the tenant's removal costs in the award of "just compensation" to be made to it. The Court stated in that case, 323 U.S. at 378:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

See also *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), where the Court held that the amount of damages to be awarded as a result of a temporary taking of a laundry included an allowance for diminution in the value of the business due to the loss of its customers.

In *United States* v. *Dow*, 357 U.S. 17, 26 (1958), the Court stated that the abandonment of a condemnation proceeding by the Government could give rise to a claim of a temporary taking of property.

No decision of this Court to our knowledge, however, has yet been rendered which has declared that a *de facto* condemnation of property has or has not occurred during the

period an unconstitutional zoning ordinance was in effect. The question is novel because it arises only after the resolution of the equally novel question of whether such an unconstitutional enactment has effected a permanent taking of property. The latter question is substantial and important for municipal planning officials as well as for the citizen subjected to the zoning regulations of the municipality. It is submitted, however, that the issue of a permanent taking will not be fully resolved if the municipality and its citizens have not been apprised of the circumstances which will give rise to a temporary, as well as a permanent, taking resulting from the enactment of an unconstitutional zoning ordinance. If municipalities must plan their growth with the consent of their constituents they should know the full consequences of the enactment of such ordinances.

New York has recognized the right to compensation under analogous circumstances. See *Keystone Associates* v. *State of New York,* 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), *aff'd,* 33 N.Y.2d 848, 352 N.Y.S.2d 194, 307 N.E.2d 254 (1973), where the enactment of a statute, which had been declared unconstitutional because it deprived a lessee of the right to demolish the existing building and to construct a new building on the premises, was held to have effected a temporary appropriation of the property until the lessee was issued a demolition permit.

As indicated above in the instant case the Court of Appeals did not rule on the question of a temporary taking. However, this Court in the past has undertaken to decide what items of damage might be proved at trial resulting from a temporary taking where the question was deemed "fundamental to the further conduct of the case." *United States* v. *General Motors Corp., supra,* 323 U.S. at 377. Similarly, in the instant case, where, if the order of the Court of Appeals is affirmed, the only remaining issue is whether the Owners are entitled to damages as for a tem-

porary taking, it seems pointless to remand the case to the New York State courts for an additional four years of litigation when the issue can be decided at this time. See *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-154 (1964).

Conclusion

For the reasons set forth above, the Court should note probable jurisdiction or in the alternative should grant certiorari to review the opinion and order of the Court of Appeals of the State of New York.

Dated: New York, New York
September 30, 1976

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and Harry B. Helmsley

APPENDIX I

Filed With the Supreme Court of the State of New York on July 23, 1976.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 3611/73

FRED F. FRENCH INVESTING COMPANY, INC.,

Plaintiff-Appellant-Respondent,

—against—

THE CITY OF NEW YORK,

Defendant-Respondent,

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Defendants-Respondents-Appellants,

THE PEOPLE OF THE STATE OF NEW YORK,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ramsgate Properties, Inc., North Assemblage Company, South Assemblage Company and Harry B. Helmsley, the Defendants-Respondents-Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Court

of Appeals of the State of New York entered May 4, 1976, affirming the order of the Appellate Division, First Department entered February 4, 1975, insofar as said orders affirmed so much of the judgment entered herein in the office of the Clerk of the County of New York on the 25th day of April, 1974, denying the motion of Defendants-Respondents-Appellants North Assemblage Company and South Assemblage Company for summary judgment on their cross-claim against Defendant-Respondent The City of New York declaring that the Zoning Amendment enacted by resolution of the Board of Estimate of the City of New York on December 7, 1972, establishing a "Special Park District" constituted a taking of the Tudor City park areas referred to in said resolution and directing The City of New York to pay to Defendants-Respondents-Appellants North Assemblage Company and South Assemblage Company the damages sustained as a result thereof, subject to the rights of the plaintiff thereto.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York, July 23, 1976.

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Appendix I.

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October Term 1976

No.76-467

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY,a partnership, and HARRY B. HELMSLEY,

Appellants,

-against-

THE CITY OF NEW YORK,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

MOTION TO DISMISS

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IN THE
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No. 76-467

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

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THE CITY OF NEW YORK,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

MOTION TO DISMISS

Appellee ("City") moves to dismiss the appeal on the ground that one of the federal questions presented is not substantial and the other was neither properly raised nor expressly decided.

FIRST QUESTION PRESENTED

(a)

To the extent that appellants ("owners") have adopted the jurisdictional statement in Fred F. French Investing Company, Inc. v. The City of New York, No. 76-460, the Court is respectfully referred to our motion to dismiss therein, which is to be submitted simultaneously with the instant motion. Copies of our motion papers in French will have been served upon the appellants here.

(b)

However, an additional note on finality is indicated. The French appellant urged only that the effect of the zoning change was to vest in the City title to the fee. But the owners, while purporting to reserve their right on appeal to press that position (150)*, moved for "reargument" on the

*Numbers in parentheses refer to pages of the Record, unless otherwise indicated.

grounds that a "de facto" temporary appropriation" had taken place before the declaration of invalidity and restoration of the prior zoning classification, thus entitling them to recover for the loss of use of the land "during the period the illegal zoning amendment was in effect" (152). The motion was denied with the observation that a compensation issue had not been decided and that in any event proof of loss had to await trial (170).

"ADDITIONAL" QUESTION PRESENTED

The owners urge the "additional" question of whether they are entitled to "damages as for a temporary taking". This was neither properly raised nor expressly decided.

Such an issue was raised at nisi prius on the owners' motion for "reargu-

ment" (149-155). No appeal was taken from the denial of that motion (171).

The owners' briefs in the Court of Appeals, submitted prior to their motion for reargument in that Court, contained no argument regarding "temporary taking". Even if their failure to appeal had not precluded them from asserting it, they did not do so in fact.

It was not until they moved for reargument in the Court of Appeals that they may have raised the question, when they used a term such as "temporary taking". Under New York practice it was then too late. Reilly v. Steinhart, 218 N.Y. 660 (1916).

The owners mistake the issue which was tendered to the Court of Appeals and which it refused to decide. It was not one of compensation based on a taking

but one of damages, as in tort, flowing from an illegal exercise of discretionary governmental power. Cf. Visidor v. Cliffside Park, 48 N.J. 214, 225 A. 2d 105 (1966), cert. den. 386 U.S. 972; Keystone Associates v. State of New York, 33 NY 2d 848, 850-851 (dissenting opinion), 307 N.E. 2d 254 (1973). The compensation issue presented by the owners was the same as that here presented by appellant in French. Their main brief in the Court of Appeals recited that the owners "agree with and adopt the statement of facts and argument" of that appellant. The Court of Appeals decided it against them. The damage issue had been pressed by the City.

The distinction between the issue so adopted by the owners and the issue tendered by the City is evidenced in the Court of Appeals opinion at the first full paragraph appearing at page 2a of the jurisdictional

statement in French. It appears very clearly at page 14a, where the Court comments that the owner never made an unequivocal claim with respect to damages but "Instead, it claims compensation for value appropriated as for an 'inverse' taking in eminent domain", a "view of the invalid amendment... not adopted for the reasons discussed at length earlier". That view of the invalid amendment was the one which appellant French had argued at length and which was adopted by the owners.

To the extent that the instant jurisdictional statement (p. 4) observes that the City "conceded" something during oral argument in the Court of Appeals, it is correct. It was a question from the bench, asked of counsel for the City, before other counsel had been heard, which prompted the "concession". It was not, as set forth at

page 4 of the jurisdictional statement, that the "pleadings were broad enough to encompass a claim for a temporary taking". Counsel for the owners who argued in the Court of Appeals was more accurate in his affidavit on the motion for reargument in that Court. There he wrote that the concession was that the pleadings were "broad enough to encompass a claim for damages caused by the enactment of the zoning amendment."

The concession affords an additional insight into the reference by the Court of Appeals to the absence of an unequivocal claim for damages. In New York a pleading is not vitiated by an erroneous characterization of the asserted wrong or by a request for relief which is wholly improper. The pleader is entitled to such relief as is warranted by the facts. Also, pleadings are liberally construed. The City read the

owners' pleading (89-90) to assert a claim not only of inverse condemnation of the fee but also for damages independent of a taking, and it asked for a declaration against such a claim. It was that issue which the Court of Appeals stated was not properly before the Court. There was no refusal to decide any other issue before it.

CONCLUSION

The appeal should be dismissed.

New York, N.Y.

October 27, 1976

Respectfully submitted,

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On Appeal From The Court Of Appeals
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BRIEF IN OPPOSITION TO MOTION TO DISMISS

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On Appeal From The Court Of Appeals
Of The State Of New York

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellants (the "Owners") submit this brief in opposition to the motion of Appellee City of New York (the "City") to dismiss the appeal herein.*

---

* References herein shall be as follows:

"City Fr. Br. "shall refer to the City's brief on its motion to dismiss the appeal in Fred F. French Investing Company, Inc. v. The City of New York, No. 76-460. "City Ram. Br." shall refer to the City's brief on its motion to dismiss the appeal herein.

The City argues that the first question raised in this appeal, i.e., whether the New York City Zoning Amendment effected a compensable taking of the Owners' property, is neither substantial nor final. The question is alleged not to be substantial because "there was no taking" by reason of the fact that the Zoning Amendment "had no practical effect" on the Owners. City Fr. Br., p. 5. The City also states that "[t]here was no evidence that any official action attributable to the enactment impeded the Owners in their use of the land." Ibid. With all due respect, this amounts to begging the question and reversing the findings of the courts below. The New York State Court of Appeals has already held that the Zoning Amendment "deprived the Owners of the reasonable income productive or other private use of their property", 39 N.Y.2d at 591, 385 N.Y.S.2d at 7, "destroys the economic value of the property," and deprives the Owners of their property without due process of law. 39 N.Y.2d at 598, 385 N.Y.S.2d at 12.

It is submitted that it is a substantial constitutional question whether the Owners are thereby entitled to receive any compensation for such an unconstitutional violation of their property rights or whether they can merely be compelled to accept a restoration of the status quo ante. The Court of Appeals has left the Owners without any compensation despite the fact that on its face the Zoning Amendment operated unconstitutionally at least to take their property for a period of more than three years. It is submitted that it is a substantial federal question that the Fifth Amendment provision that private property "shall not be taken for public use without just compensation" has been so interpreted by the courts below.

The City also argues that the judgment below was not final because the parties were still entitled to prove at trial a physical occupation of the property by the City (City Fr. Br., p. 2) and because the New York County Supreme Court had stated on motion for reargument that proof of loss of the Owners' claim of a temporary

taking had to await trial (City Ram. Br., p. 3). The Court of Appeals has held and found that the Owners' constitutional rights were violated and the economic value of their property destroyed by enactment of the Zoning Amendment, but that the Owners' are not entitled to compensation as for a taking. 39 N.Y.2d at 595, 385 N.Y.S.2d at 9-10. This is a final judgment insofar as the Owners are concerned since the Zoning Amendment has been finally construed by the New York State Court of Appeals not to have effected a taking. Nothing further may be done by the Owners in the New York State courts to alter what is the essential holding of this case.

The Owners concede that they have no evidence of governmental occupation of their property other than the enactment of the Zoning Amendment. There is, therefore, nothing to be presented at trial on the question which this Court is being asked to review. That a subsequent trial may determine the amount of damages sustained by the Owners resulting from the temporary taking does not make the judgment below non-final, since

such a proceeding would merely be an accounting, which could just as easily be heard before a referee as a court. Hudson Distributors Inc. v. Eli Lilly & Co., 377 U.S. 386, 389 n. 4 (1964); Local No. 438 v. Curry, 371 U.S. 542, 549 (1963).

The City argues that this Court may not review the additional question presented as to whether the Owners are entitled to damages as for a temporary taking because this question was not "properly raised nor expressly decided" below. City Ram. Br., p. 3. The Owners' jurisdictional statement in this appeal shows that this issue has been raised at every stage of the proceedings below. The motions for reargument in the New York County Supreme Court and the Court of Appeals specifically were addressed to the temporary taking question only because those courts had failed to deal with the question when the issue had been presented to them in the first instance. The City itself recognizes this to be the case since it concedes that the issue was raised in oral argument before the Court of Appeals. City

Ram. Br., pp. 6-7. The City's effort to characterize the issue as a tort claim by the Owners for damages rather than as a claim for a temporary taking is an exercise in semantics, both claims being the same. The damages which result from the enactment of legislation which destroys the economic value of property are the same, after all, as the value of the property which has been taken from its owner while such legislation is in effect. This was recognized in Keystone Associates v. State of New York, 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), aff'd, 33 N.Y.2d 848, 352 N.Y.S. 194, 307 N.E.2d 254 (1973), where the Appellate Division, Third Department, used the terms interchangeably. The Owners understood this to be the case, and, it is submitted, the Court of Appeals did, when the City asked for a declaration that the Owners were not entitled to such damages.

In reality, there is only one question to be decided by the Court -- whether the restoration of the prior zoning classification by the courts below meets the standard of the Fifth Amendment

that private property shall not be taken for public use "without just compensation". It is submitted that the Court's consideration only of the question whether the enactment of the Zoning Amendment has given rise to a permanent taking will give an incomplete answer to the question and will leave the parties in doubt as to their rights.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Dated: New York, New York
November 3, 1976

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see

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